United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

ORIGINAL

75-2147

United States Court of Appeals
FOR THE SECOND CIRCUIT

ARCHIE CHESNEY,

Petitioner-Appellee,

against

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers,

Respondent-Appellant.

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P/S

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, GRANTING PETITION FOR A WRIT OF HABEAS CORPUS

APPELLANT'S BRIEF AND APPENDIX

RICHARD F. JACOBSON
Assistant State's Attorney for
Fairfield County
Attorney for Appellant
County Court House
Bridgeport, Connecticut 06604

DONALD A. BROWNE
State's Attorney
Of Counsel

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United States Court of Appeals
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DOCKET No. 75-2147

ARCHIE CHESNEY,

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CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers,

Respondent-Appellant.

BRIEF FOR THE APPELLANT

Statement of the Case

This is an appeal from a judgment of the United States District Court for the District of Connecticut (Blumenfeld, J.), dated November 21, 1975, ordering the issuance of a Writ of Habeas Corpus from said court unless the State of Connecticut within twenty (20) days from the issuance of the court's Memorandum of Decision on November 13, 1975, vacated the appellee-petitioner's judgment of conviction and scheduled an early retrial. The District Court found that Chesney in his trial was denied a right guaranteed to him by the Sixth and Fourteenth Amendments of the Constitution of the United States.

On March 8, 1971, pursuant to Article First, Section 8 of the Connecticut Constitution and Section 54-45 of the Connecticut General Statutes, Archie Chesney was indicted for the first degree murder of Robert Lubas in violation of then Section 53-9 of the Connecticut General Statutes. The indictment and subsequent trial before the petit jury occurred in the Superior Court for Fairfield County at Bridgeport, Connecticut. On May 28, 1971 after a full trial before the jury Chesney was found guilty of second degree murder in violation of then Section 53-9 of the Connecticut General Statutes. On June 4, 1971, Chesney was sentenced to a term of life imprisonment at the Connecticut Correctional Institution at Somers. Chesney is presently incarcerated there under a stay of execution pending disposition of this case on appeal to this Court issued by the District Court of Connecticut on November 24, 1975. The appellant, Carl Robinson, is the Warden of that Institution.

From the judgment of conviction of second degree murder in the Superior Court Chesney processed an appeal to the Connecticut Supreme Court. The judgment of conviction was affirmed and the written opinion of the Connecticut Supreme Court is reported in 36 Conn. L. J., No. 4, p. 21 (July 23, 1974). Chesney's petition for a Writ of certiorari filed in the United States Supreme Court was denied on November 11, 1974. *Chesney* v. *Connecticut,* 419 U.S. 1004, 95 S.Ct. 324, 42 L.Ed. 2d 280. Thereafter Chesney filed the petition for writ of habeas corpus in the federal district court in accordance with 28 U.S.C. §§ 2241 and 2254.

Statement of the Facts

On February 9, 1971, at approximately 11:30 A.M. Robert Lubas and his friend, James Lindsey, went to Apartment 703 of the complex known as the Beardsley Terrace Apartments in the City of Bridgeport. Present in the apartment when they arrived were Archie Chesney, his

brother, Clarence Chesney, Alfred Peterson and Richard Bush. Archie Chesney had in his possession a portion of a rifle which was inside a folded umbrella. An argument ensued between Lubas and Chesney during which the latter claimed Lubas owed him some money. Chesney told Lubas that he wanted to talk to him and they went down a hallway to the area of a bedroom. According to Richard Bush, he and Clarence Chesney attempted to break up the argument between the two and while he was facing Lubas he heard a popping sound and immediately turned around and grabbed a gun from Archie Chesney. Alfred Peterson observed Lubas go to the rear bedroom area with Chesney, heard an argument and a shot and then saw Lubas as he was taken away by another person. After the shot was fired Lubas staggered up the hallway where he told Lindsey that Archie Chesney had shot him. Lindsey then transported Lubas to the hospital where he expired.

The rifle was turned over to the police and a comparison examination revealed that the bullet which was extracted from Lubas' body was fired from it. Paraffin casts were obtained from both hands of Chesney for the purpose of determining whether there was any gunpowder residue or nitrates on them. The umbrella was similarly tested. These tests proved positive for the presence of gunpowder residue and nitrates indicating that Chesney had fired a gun through the umbrella. Tests on Lindsey's hands were negative.

On the evening of the murder when he was questioned at his apartment by the police Chesney initially identified himself as "Wade Harrington." After being fully advised of his constitutional rights Chesney related that he had not been involved in the shooting but in fact had been at a poolroom from 10:00 A.M. to 1:00 P.M. and then visited with his girlfriend, went to a barbershop and then back with his girlfriend until the police arrived. In addition Chesney denied owning a gun.

At the trial Chesney presented no evidence in his own behalf. Although his unsuccessful appeal to the Connecticut Supreme Court raised several issues Chesney's petition for writ of habeas corpus focused on the exclusion by the trial court of a line of inquiry asked of Lindsey on cross-examination. It is now claimed that this evidentiary ruling deprived Chesney of the right of confrontation guaranteed to him by the Sixth Amendment as made applicable to the individual states by the mechanism of the Fourteenth Amendment. The following occurred during the course of cross-examination of Lindsey by Chesney's counsel:

> Cross Examination by Mr. Galluzzo:
>
> Q. Mr. Lindsey, you testified at the Grand Jury indictment; is that correct?
>
> A. Yes, I did.
>
> Q. When you testified at the Grand Jury indictment, you never mentioned the fact that Archie had shot him as a response to a question you asked Mr. Lubas, did you?
>
> Mr. Browne: I object to this, if your Honor please. That certainly isn't a legitimate question. If he can show us a transcript of some inconsistent statement, I think he's entitled to it. I don't know of any basis which he can ask that type of a question, your Honor, which I assume is trying to show an inconsistency by saying someone didn't say anything in any particular manner or time.
>
> Mr. Chesney: Suppose to give the same testimony, don't they?
>
> The Court: I'll excuse the jury at this time.
>
> (Whereupon at this time the jury left the courtroom.)
>
> The Court: All right, Mr. Chesney, please stand.
>
> You have been doing very well up to now. As I said before, you have no right to interrupt the pro-

ceedings. Anything you have to say, Mr. Chesney, tell your counsel.

Mr. Chesney: All right.

The Court: If counsel has any objection, he will make the objection, Mr. Chesney. You can't interrupt the trial.

Mr. Chesney: All right.

The Court: If and when the time comes that you want to tell your story, that's up to you. You have a right to take the stand, but you can't do it now. Do you understand? You have been doing good up to now, Mr. Chesney, so don't spoil it.

Mr. Chesney: All right.

The Court: Now Mr. Browne, I'll hear you.

Mr. Browne: My claim, if your Honor please, is that this is an attempt to show inconsistency or an impeachment by an inconsistency. You cannot impeach someone by showing that he didn't say something at a prior hearing. Further, your Honor, I know of no authority whatsoever which will allow interrogation of a witness on something that he didn't say at a Grand Jury proceeding where there are no minutes of it. There is no reported transcript of it. I submit first, your Honor, you can't impeach by showing that someone didn't say something. You can't impeach someone by showing that he didn't say something on another proceeding, and further where there is no transcript of this proceeding. I say again, your Honor, this is not legitimate cross examination.

Mr. Galluzzo: Well, I feel the question is proper on two counts. One, your Honor, he mentioned that he testified in the Grand Jury proceedings. It goes to the heart of the matter. It goes right to the heart of the matter where he said in Court that Lubas said Archie shot me, and I think this would be critical, your Honor. Mr. Chesney was at the Grand

Jury proceedings, and if he takes the stand, your Honor, I believe this man's testimony can be impeached by testimony given by the witness. He is not automatically excluded.

The Court: Well, you see what you are doing here, Mr. Galluzzo, you are invading the secret proceedings of the Grand Jury. Now, what he did not say at a Grand Jury proceeding is not anything that can be used to impeach his credibility as I see it now. In the first place, as we know a Grand Jury proceeding, Mr. Galluzzo, it is very informally conducted. It is not done under the guise of a trial. It's only an inquest to determine whether or not sufficient evidence has been offered to a Grand Jury to justify a true bill of indictment. So that what he didn't say to the Grand Jury I don't think can be used at this time to impeach the credibility of this witness.

Mr. Galluzzo: May I say this, your Honor, that maybe the phraseology of the question is bad. May I ask the question?

By Mr. Galluzzo:

Q. Did you tell the Grand Jury that Lubas said Archie shot me? This is something which again goes to the heart of the matter.

The Court: Suppose he says, no. Let's assume that he says, no. I don't believe that his testimony, number one, Mr. Galluzzo, impeaches the credibility of this witness, and number two, I don't think it's proper in this proceeding because again we are getting into the Grand Jury room. Unless you can show me some authority that says that this type of cross-examination is permissible, I will have to exclude the question.

Mr. Galluzzo: I don't have any authority at this time in writing, your Honor.

The Court: Until such time as our Supreme Court

tells us that that is the way to proceed in these matters, Mr. Galluzzo, I will have to exclude the testimony. I know of no Connecticut decision which would permit this type of interrogation on cross-examination. Now, if you can show me some Connecticut case or some United States Supreme Court decision which upholds your position, Mr. Galluzzo, I shall certainly consider it.

Mr. Galluzzo: I take it, your Honor, that you are sustaining the objection against the question.

The Court: Yes.

Mr. Galluzzo: Outside the presence of the jury, your Honor, may I put another question to Mr. Lindsey?

By Mr. Galluzzo:

Q. Did you tell the Grand Jury that your conversation with Lubas at the time in the apartment that Lubas said, "Archie shot me?"

Mr. Browne: Object to that for the same reasons, your Honor.

The Court: I'll sustain the objection on the same grounds that unless you can show me some authority for invading the proceedings within the Grand Jury room, I will not allow him to answer that question.

Mr. Galluzzo: Thank you. May I have an exception?

The Court: Exception. Summon the jury, Sheriff.

(Whereupon at this time the jury entered the courtroom and took their respective seats in the jury box.)

(Trial Transcript, pp. 37-42.)

ARGUMENT

I. The appellee has not exhausted his state remedies.

A reading of the opinion of the Connecticut Supreme Court, *supra,* indicates that court did not decide the case on constitutional grounds. The lynchpin of the federal district court's decision is that under the facts presented to it Lindsey's possible silence before the grand jury in regards to Lubas' spontaneous utterance did not constitute a meaningful cross-examination.

It is unquestioned that prior to invoking a request for habeas corpus relief a state prisoner must exhaust his available state remedies. 28 U.S.C. § 2254; *Clark* v. *Nickeson,* 321 F. Supp. 415 (D. Conn. 1971). A reading of the Connecticut Supreme Court's opinion and the trial court transcript indicates that neither decided the issue on constitutional grounds. Since the constitutional issue has not been presented to or decided by a state court it is submitted that Chesney should be required either to file a petition for state habeas corpus or a petition for a new trial. Sections 52-466 and 52-270 of the Connecticut General Statutes; *Aillon* v. *State,* 36 Conn. L.J., No. 49, p. 10 (June 3, 1975).

The respondent would urge that the case of *Picard* v. *Connor,* 404 U.S. 270, 92 S. Ct. 509, 30 L.Ed.2d 438, is controlling on this point. In *Picard* the grand jury returned a murder indictment wihch was later amended to substitute the respondent's name for the "John Doe" referred to in the indictment. The state's highest court affirmed the conviction thus rejecting the challenge to the legality of the indictment made on the ground that the amending procedure did not comply with the statute. The United States Supreme Court held that the substance of a federal habeas corpus must be fairly presented to the state courts and since in that instance the state's highest court did not have a fair opportunity to consider and act on the constitutional

claims the respondent had not exhausted his state remedies. Mr. Justice Brennan during the course of the opinion stated:

> It has been settled since Ex parte Royall, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See, e.g., Nelson v. George, 399 U.S. 224, 229 (1970); Irvin v. Dowd, 359 U.S. 394, 404-405 (1959); Ex parte Hawk, 321 U.S. 114 (1944). The exhaustion-of-state remedies doctrine, now codified in the federal habeas corpus statute, 28 U.S.C. §§ 2254 (b) and (c), reflects a federal-state comity, Fay v. Noia, 372 U.S. 391, 419-420 (1963); Bowen v. Johnston, 306 U.S. 19, 27 (1939), "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." Wilwording v. Swenson, ante, p. 249, at 250. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." Darr v. Burford, 339 U.S. 200, 204 (1950) (overruled in other respects, Fay v. Noia, supra, at 435-456). It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. See, e.g., Wilwording v. Swenson, supra, at 250; Roberts v. LaVallee, 389 U.S. 40, 42-43 (1967); Brown v. Allen, 344 U.S. 443, 447-450 (1953). *Picard* v. *Connor, supra,* 275.

The requirement of exhaustion of state remedies "would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal

habeas proceeding does it make sense to speak of the exhaustions of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts." Id., page 276.

In the case *sub judice* like in *Picard* the constitutional claim was never submitted to the state courts. To permit this court to consider it would be to fly in the face of the requirement of exhaustion of available state remedies.

II. The exclusion of the cross-examination concerning the witness' earlier Grand Jury testimony did not violate Chesney's Sixth Amendment rights.

Counsel for Chesney at trial attempted in three questions, each phrased differently, to cross-examine Lindsey as to whether or not he told the grand jury of the spontaneous utterance made by Lubas after he was shot. It is respectfully submitted that due to the improper syntax of the questions, the law of prior inconsistent statements, and the status of grand jury testimony in Connecticut that the questions were properly excluded.

Chesney claims that his trial counsel should have been permitted to ask Lindsey on cross-examination whether or not he told the grand jury that Lubas had told him that Chesney shot him. Apparently the answer to this question was desired in an effort to impeach the testimony of Lubas. Of cardinal significance is the fact that no stenographic transcript is made of proceedings before the grand jury. As the Connecticut Supreme Court has recently stated:

> It is the general practice in most states not to require a stenographic record of the grand jury proceedings; 38 C.J.S., Grand Juries, § 44; and it is not required under the Federal Rules of Criminal Procedure. United States v. Caruso, 358 F.2d 184 (2d

Cir. 1966), cert. denied, 385 U.S. 862, 87 S.Ct. 116, 17 L. Ed. 2d 88. In State v. Vennard, supra, we noted that, in view of the very limited purpose of the grand jury and the requirement of secrecy as to its deliberations, "We see no reason to permit a defendant to jeopardize that secrecy by recording in writing or otherwise what transpires merely for the purpose of making such an investigation a more effective tool for discovery." There is no constitutional or statutory right to have a stenographer present in the grand jury room and we find no error in the refusal of the trial court to permit it in this case. State v. Delgado, 161 Conn. 536, 539-540, 290 A.2d 338.

The secrecy of grand jury hearings and the non-transcribing of testimony before that body have been a part of our law for the past 170 years. *Lung's Case,* 1 Conn. 428. Furthermore the informality and limited purpose of a grand jury as the accusatory body in capital cases has been recognized. *State* v. *Guay,* 25 Conn. Sup. 61, 64, 196 A.2d 599.

There exists no constitutional or statutory requirement that grand jury testimony be recorded. *United States* v. *Biondo,* 483 F.2d 635, 641 (8th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1468, —— L.Ed.2d ——; *United States* v. *Franklin,* 429 F.2d 274, 276 (8th Cir. 1970), cert. denied, 400 U.S. 967, 91 S.Ct. 380, 27 L.Ed.2d 387; 8 *Moore's Federal Practice,* The Grand Jury § 6.02n; 1 *Wright, Federal Practice and Procedure,* Indictment and Information, § 103. See also *United States* v. *Youngblood,* 379 F.2d 365 (2nd Cir. 1967); *United States* v. *White,* 417 F.2d 89 (2nd Cir. 1969), cert. denied, 397 U.S. 912, 90 S.Ct. 910, 25 L.Ed.2d 92; *United States* v. *Ayres,* 426 F.2d 524 (2nd Cir. 1970), cert. denied, 400 U.S. 842, 91 S.Ct. 85, 27 L.Ed.2d 78; and *United States* v. *Cramer,* 447 F.2d 210 (2nd Cir. 1971). If the grand jury testimony of Lindsey had been transcribed, trial counsel would have been per-

mitted a copy under the provisions of Section 54-86b of the Connecticut General Statutes. This statute was later ruled unconstitutional in *State* v. *Clemente,* 36 Conn. L.J., No. 1, p. 1 (July 2, 1974), but has been superseded by rule of court. *Practice Book,* §§ 533P and 533S. Grand Jury testimony since 1970 has been the subject of discovery in the federal courts due to the Jencks Act. 18 U.S.C. § 3500 (e)(3). Thus the lack of a transcript did not violate any of Chesney's constitutional rights.

Counsel for the appellee asserts that the Chesney case is controlled by the decision in *Davis* v. *Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347. Davis was convicted of grand larceny and burglary in regards to the theft of a two foot square safe from a bar known as the Polar Bear in Anchorage. Richard Green was a crucial witness for the prosecution. He had a juvenile record stemming from the burglary of two cabins and at the time of Davis' trial was on probation. A protective order was entered prior to the testimony prohibiting any reference to Green's juvenile record by the defense in the course of cross-examination. The Chief Justice's opinion quoting from the trial transcript a portion of Green's cross-examination exemplified the fact that the protective order effectively left unchallengeable Green's "protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorial denial of ever having been the subject of any similar law-enforcement interrogations." Citing the fact that the confrontation clause includes the right to a meaningful cross-examination the Court concluded:

> As in Alford, we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself. *Davis* v. *Alaska,* supra, 320.

The tenor of the decision is a balancing of the state's desire to maintain the secrecy of juvenile records and the right of a defendant to effectively confront and cross-examine the key witness against him. I believe that the Court struck the balance at a point where the witness was permitted to use the protective order to commit perjury. Cf. *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L. Ed.2d 1. In Chesney the long standing tradition and law surrounding the legitimate state purposes in maintaining the secrecy of grand juries was not utilized as a means of permitting the witness to give false or even contradictory testimony.

The case of *Chambers* v. *Mississippi*, 410 U.S. 284, 94 S.Ct. 1038, 35 L.Ed.2d 297, is also not controlling in this instance. In Chambers a combination of the state's hearsay rule and voucher rule were used effectively to deny the defendant's constitutional rights to subject a witness who had admitted to the crime on four occasions to cross-examination. Justice Powell in the course of his opinion finding the voucher rule no longer applicable to crimi al cases stated:

> Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process. It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonable be expected to stand firmly behind their testimony. But in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them. Moreover, as applied in this case, the "voucher" rule's impact was doubly harmful to Chamber's effort to develop his defense. Not only was he precluded from cross-examining McDonald, but, as the State conceded

> at oral argument, he was also restricted in the scope of his direct examination by the rule's corollary requirement that the party calling the witness is bound by anything he might say. He was, therefore, effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession. *Chambers* v. *Mississippi,* supra, 296-297.

The Mississippi rules of evidence thus stripped Chambers of the ability to present evidence that another person had admitted to crime on several occasions. There was no such comparable injustice placed upon Chesney. None of his defenses were cut off. The area of cross-examination e.g. impeachment of Lindsey, was not denied the petitioner. See *United States* v. *Hay,* 376 F. Supp. 264, 274 (D. Colo. 1974). In *Smith* v. *Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 Ed.2d 956, it was held to be a denial of the right of confrontation to sustain an objection to an inquiry seeking the principal prosecution witness' name and address. *Alford* v. *United States,* 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624, reversed a conviction which excluded a question asking the witness where he lived. The elimination of these lines of inquiry in practical terms denied the defendants entire areas of cross-examination which clearly and directly bore on the credibility of the witnesses. In Chesney whether or not he told the grand jury what Lubas had said to him would have relevance only if he were under a duty to speak and if he was asked that specific question. And in *Pointer* v. *Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, it was the use of a transcript which did not afford the petitioner his full rights of confrontation and cross-examination which resulted in the constitutional defect. The claim of Chesney is an attempt to blow the significance of the issue out of all proportion to its meaning.

Connecticut of course recognizes the propriety of attacking a witness' credibility by evidence of his materially

inconsistent statements. *State* v. *Keating,* 151 Conn. 592, 597, 200 A.2d 724, cert. denied, sub nom. *Joseph* v. *Connecticut,* 379 U.S. 963, 85 S.Ct. 654, 13 L.Ed.2d 557. In a discussion concerning variance in testimony by a witness at a second trial the Connecticut courts have pointed out the significant factors as follows:

> If he was called only upon a different point on the first trial, and was asked upon that trial no question calling for testimony upon the point testified to upon the second, the fact that upon the first trial he failed to testify upon that point would afford the jury no ground for questioning the accuracy of the witness' memory, or his veracity, credibility or fairness, and questions like those now attempted to be supported would properly be excluded. *State* v. *Mosca,* 90 Conn. 381, 391, 97 A.340.

Whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial court. *Grunewald* v. *United States,* 353 U.S. 391, 423-424, 77 S.Ct. 963, 1 L.Ed.2d 931; *United States* v. *Anderson,* 498 F.2d 1038, 1043 (D.C. Cir. 1974). The trial court in Chesney was faced with a dilemma. Absent an admission that he had testified differently before the grand jury the only way Lindsey's credibility could have been impeached would have been to have Chesney take the stand or to call in all eighteen members of the grand jury and test their individual recollections. Assuming it was necessary for one or both of the parties to call all of the grand jurors the possibility exists that there would be eighteen disparate memories. What then would have been the probative value of such a line of inquiry? The trial would have gone far afield of its intended goal. The purpose would have been lost in the confusion, ambiguity, and parade of witnesses. In view of the difficulties presented the trial court rightly exercised its discretion in limiting the cross-examination.

The questions posed to the witness did not lay a proper foundation for the impeachment of a witness. Never was the witness asked if the grand jury requested Lindsey to relate to them any conversation Lubas may have had with him after the shooting. Without this predicate we would have to assume a duty on Lindsey's part to speak. 98 *C.J.S.*, Witnesses § 604 a; 4 *Jones On Evidence* § 26.3 (1972 Ed.). The distinction between this case and Davis and Chambers is apparent if we consider that in Davis the juvenile record of Green, and in Chambers the prior confessions of the witness were easily proven. The material most likely was lying at rest in defense counsel's file waiting to be used at the appropriate juncture. In Chesney there was in reality no reasonably trustworthy or mechanically obvious means available to reliably prove an inconsistent statement if in fact there was such an inconsistency.

Conclusion

In view of the foregoing facts and authorities, Appellant respectfully submits that there has been no violation of the prisoner's right of cross-examination nor has there been an exhaustion of remedies and he prays this Court to reverse the judgment of the court below and dismiss the petition for writ of habeas corpus.

Respectfully submitted,

RICHARD F. JACOBSON
Assistant State's Attorney for
Fairfield County

DONALD A. BROWNE
State's Attorney for
Fairfield County

APPENDIX

Relevant Docket Entries.

DATE 1975	PROCEEDINGS
6-3	Petition for a writ of habeas corpus filed. Application to proceed in forma pauperis, Granted, J. Blumenfeld, J. m6-9-75. Order to Show Cause Why a Writ of Habeas Corpus Should Not Be Issued filed. Blumenfeld, J. m6-9-75. Attested copies of ORDER and copies of petition handed to Marshall for service upon def.
6/13	Return to Petition for a writ of habeas corpus.
9-24	HEARING ON THE MERITS. Archie Chesney, petitioner sworn and testified. Pet. Exh. A filed. Decision Reserved.
10-2	Body writ returned, executed as Ordered.
11-13	Memorandum of Decision, Filed. Blumenfeld, J. m11-13-75. Copies mailed. (writ should issue discharging the petitioner unless within 20 days the state vacates the judgment of conviction and schedules an early retrial) Copies mailed to counsel.
11-24	Motion for Detention of Prisoner Pending Review of Decision, "Stay of execution pending disposition of this case on appeal to the Court of Appeal is granted. Blumenfeld, J. m11-24-75. Copies mailed.
"	JUDGMENT entered. Markowski, C. m 11-24-75. Copies mailed.
11/25	Notice of Appeal filed. ($5.00 pd) Copies mailed to counsel. Attested copies of appeal and docket entries mailed to U. S. Court of Appeal and New Haven. Civil Management Plan and Forms C & D to Atty Jacobson.

Memorandum of Decision, Blumenfeld, U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL NO. H-75-181

ARCHIE CHESNEY,

v.

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers.

MEMORANDUM OF DECISION

Archie Chesney, presently an inmate at the Connecticut Correctional Institution, Somers, Connecticut, brings this petition for a writ of habeas corpus to challenge the validity of his conviction for second degree murder. This court has jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. Petitioner alleges that he was denied his sixth amendment right to confront one of the witnesses who testified against him and that as a result he was denied the due process guaranteed by the fourteenth amendment.

I. *The History of this Case*

Petitioner was indicted by a grand jury for the crime of murder in the first degree on March 8, 1971. A jury in Fairfield County Superior Court returned a verdict of murder in the second degree on May 28, 1971. On June 4, 1971, petitioner was sentenced to a term of life im-

prisonment. Appeal was taken to the Connecticut Supreme Court, which affirmed the conviction. *State* v. *Chesney,* —— Conn. ——, —— A.2d ——, 36 Conn. L.J. No. 4, at 21 (July 23, 1974). The United States Supreme Court denied certiorari. 419 U.S. 1004 (1974).

At the trial the State presented evidence to show that the decedent, Robert Lubas, and a companion, James Lindsey, went to an apartment where they met with several other persons, including the petitioner. Lindsey, testifying as a witness for the prosecution, stated that Chesney and Lubas went down the hallway into the kitchen where some other persons were present. He testified that he heard an argument and a popping noise, and then saw Lubas walking down the hall holding his chest. Lindsey then testified as follows:

"Q. What, if anything, was he doing as he walked down the hall?

"A. He was holding his chest.

"Q. Did you have an opportunity to observe his face at all?

"A. Yes, I did.

"Q. How did his face appear to you?

"A. Just like a little worried look on his face.

"Q. How was he manipulating, was he able to walk all right?

"A. Yes, he was like just leaning on the wall, you know, walking out.

"The Court: Did you say leaning on the wall?

"The Witness: You know, like brushing against the wall.

"The Court: Please keep your voice up. The jury must hear you.

"Q. Did you have some conversation with Robert Lubas?

"A. Yes, I did.

"Q. Using the exact words that were spoken between you, Mr. Lindsey, would you tell the ladies and gentlemen of the jury what was said at that time?

"A. Well, he said, 'Let's get the fuck out of here,' and then I says to him, 'What happened?' He said, 'The bastard shot me.' I said, 'Who?' And he said, 'Archie.'"

Tr. 30-31.

On cross-examination, petitioner's attorney attempted to question Lindsey about an inconsistency between his testimony at trial and his earlier testimony before the grand jury. It was Chesney's contention at that time, and he so testified at the evidentiary hearing on this petition, that in his grand jury testimony, Lindsey had not quoted the decedent as identifying Chesney as his assailant. Since Lindsey admitted having given a prior inconsistent statement to the police at the start of their investigation, and since Lindsey himself had been a suspect in the slaying, petitioner contended that the additional factor of an inconsistent statement to the grand jury would have greatly assisted him in convincing the jury that Lindsey had fabricated the purported identification. This, in turn, would have greatly weakened the prosecution's case since there was no other witness, either to the shooting or to the incriminating statement.

The prosecutor objected to the attempt to show the inconsistent testimony before the grand jury on the grounds that a failure to testify could not be inconsistent with a later statement. Tr. 39. The trial court sustained the objection on the joint grounds that a prior omission would not be inconsistent and that an attempt to question a witness concerning his prior testimony before a grand jury

would violate the Connecticut rule of secrecy of grand jury proceedings. Tr. 40-41.

Petitioner contends that this ruling deprived him of the constitutionally guaranteed right to cross-examine the adverse witnesses presented against him in a criminal proceeding.

II. *Exhaustion*

In its amended return to the petition, the State argues that the constitutional claim raised in this court was not directly passed on by the Supreme Court of Connecticut in the appeal from the petitioner's conviction. The State argues that he is still free to raise the issue either in a motion for a new trial, Conn. Gen. Stat. Ann. § 52-270, or in a state habeas proceeding, Conn. Gen. Stat. Ann. § 52-466; and therefore the petition should be dismissed for failure to exhaust state remedies. 28 U.S.C. § 2254.

The question, however, is not whether the State Supreme Court passed on the constitutional issue, but rather whether the "substance" of the claim was properly presented to them. *Picard* v. *Connor*, 404 U.S. 270, 278 (1971). Petitioners cannot be deprived of their timely access to a federal court by the failure of a state court to decide a properly presented constitutional issue. *Cf. Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

In this case the constitutional issue was before both of the state courts which passed on the question. In the State Supreme Court, petitioner framed the issue raised as: "2. Did the court err in refusing cross examination of a witness as to his testimony before the grand jury?"[1] At the trial level the record shows that that court also was

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[1] Brief of Defendant at 1, *State of Chesney*.

aware of the constitutional dimensions of the petitioner's position.[2]

In his brief on appeal, petitioner relied heavily on *Chambers* v. *Mississippi* and *Williams* v. *Florida*, 399 U.S. 78 (1970).[3] In his motion for reargument, petitioner again relied explicitly on *Chambers*.[4] Though the Connecticut Supreme Court did not address the issue in its decision, and denied the motion to reargue, the substance of the claim was presented to that court for its consideration. Petitioner has fulfilled his duty to exhaust his state remedies, and the merits of his petition are thus properly before this court.

III. *The Constitutional Issue*

Evidentiary errors committed during the course of a state criminal trial are not subject to review in a federal habeas corpus proceeding unless such errors rise to constitutional dimension. *Jones* v. *Swenson*, 469 F.2d 535, 538 (8th Cir. 1972); *United States ex rel. Castillo* v. *Fay*, 350 F.2d 400, 401 (2d Cir. 1965); *Ferraro* v. *Connecticut*, No.

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[2] During argument outside the presence of the jury the court stated:

> "Now, if you can show me some Connecticut case or some United States Supreme Court decision which upholds your position, Mr. Galluzzo, I shall certainly consider it."

Tr. 41.

[3] Brief of Defendant, *supra* note 1, at 5-7.

[4]

> "For the State to deny transcription on the one hand, then deny cross examination because there is no transcript, is to bootstrap procedure into injustice. If Lindsey should have told the Grand Jury about the decedent's statement and did not, that is important evidence. To permit evidence to be lost to a defendant does not comport with modern standards of justice and fairness. Chambers v. Mississippi, 35 L. ed. 2d 297 (1973)."

Defendant's Motion to Reargue, at 4-5.

B-74-288 (D. Conn., Sept. 8, 1975). However, the substantial denial of the right of cross-examination is markedly distinguishable from the erroneous exclusion of evidence.

In this case the petitioner claims that the decision of the trial court denied him the right to an effective cross-examination, which the Supreme Court has described as "constitutional error of the first magnitude" which "no amount of showing of want of prejudice would cure." *Smith* v. *Illinois,* 390 U.S. 129, 131 (1968). Consequently this court is free to review the state court determination.

The determination of the Connecticut Supreme Court does not purport to be based solely on the Connecticut provisions for secrecy of grand jury proceedings. The relevant part of the opinion states:

> "The proceedings of a grand jury are informal and untranscribed. Morever, they are conducted in secret. *State* v. *Menillo,* 159 Conn. 264, 274, 268 A.2d 667. Thus, the form and manner in which the inquest was conducted relative to this witness, whether the witness had been asked to relate all the relevant facts or whether he had been asked questions which would have elicited the omitted facts, is unknown. It cannot be stated with any certainty that an omission in testimony before the grand jury constituted an inconsistency by which to impeach the witness' present testimony. See *State* v. *Mosca,* 90 Conn. 381, 391, 97 A. 340. Under these circumstances, the secrecy of the grand jury proceedings could not be invaded. See *State* v. *Coffee,* 56 Conn. 399, 410, 16 A. 151; *State* v. *Fasset,* 16 Conn. 457, 467."

36 Conn. L.J. No. 4, at 22.[5]

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[5] The cases upon which the court relies, while they do deal with grand jury secrecy, do not support the court's position. In *State* v.

(*footnote continued on following page*)

Nor does the court deny that a failure to testify to a fact which would naturally have been mentioned is legally as inconsistent as a specific prior statement to the opposite effect.[6] Instead, the reasoning of the court appears to be that, since the grand jurors are sworn to secrecy,[7] and since there is no transcript of the grand jury proceedings,[8] there is no way in which the trial judge could properly determine the preliminary issue of whether a statement or omission before the grand jury was sufficiently inconsistent to justify its introduction for impeachment purposes.[9]

(*footnote continued from preceding page*)

Fasset, 16 Conn. 457, 466-67 (1844), the court states:

> "And it was early decided, that a grand-juror should not be allowed to swear what was give in evidence [*sic*] before the grand-jury, because he is sworn not to reveal the secrets of his companions. . . . An exception to this may be found when a witness testifies differently on the trial before the petit jury, from what he did before the grand-jury: then the grand-jury may be called to contradict him on that trial. . . ."

In *State* v. *Coffee*, 56 Conn. 399, 410, 16 A. 151, 152 (1888), the court cites *Fasset, supra*, with approval, and states:

> "Perhaps it would be proper to say that the oath has this implied qualification, that the testimony is to become secret unless a disclosure is required in some legal proceeding. It does not seem that the policy of the law should require it to be kept secret at the expense of justice."

Regardless of whether the Connecticut Supreme Court intended to effect a change in its law, or simply overlooked the critical exceptions to the rule of secrecy set out in these earlier decision, the effect on petitioner's constitutional rights is the same.

[6] *See Schurgast* v. *Schumann*, 156 Conn. 471, 482, 242 A.2d 695, 701 (1968); McCormack, *Evidence* § 34 (2d ed. 1973).

[7] Conn. Gen. Stat. Ann. § 1-25.

[8] *State* v. *Delgado*, 161 Conn. 536, 539-40, 290 A.2d 338, 340 (1971). The failure to provide a transcript has been consistently upheld against constitutional challenge. *See, e.g., United States* v. *Ayers*, 426 F.2d 524 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970).

[9] This appears to ignore two possible ways other than by use of a transcript in which the inconsistency could both have been shown as

(*footnote continued on following page*)

This ruling, as affirmed by the Connecticut Supreme Court, deprived the petitioner of his opportunity to fully present to the jury his theory that the chief prosecution witness had fabricated a significant portion of his testimony, and, particular, the damaging accusation by the decedent.

It is true that the petitioner was able to demonstrate a motive for fabrication, both from the fact that Lindsey and the decedent were friends and from the fact that Lindsey himself had been considered a suspect in the killing. The petitioner also demonstrated that Lindsey had given a completely inconsistent account of the shooting in his statement to police. However, it is clear that the identification by the decedent was especially critical. The jury asked that it be reread to them (Tr. 270-71), and the Connecticut Supreme Court quoted it verbatim in its summary of the facts which the jury could have found. *State* v. *Chesney,* 36 Conn. L.J. No. 4, at 21. Lindsey was the only witness who testified to the identification. Had the petitioner been able to convince the jury that Lindsey had invented his testimony, the State's case would have been greatly weakened. Restricting questioning concerning such critical testimony involves more than what the Connecticut Supreme Court characterized as a permissible exercise of a trial judge's

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(*footnote continued from preceding page*)

a preliminary matter and proved if necessary, if the witness were to have denied his earlier inconsistent omission. The first would have been to call the grand jurors themselves. This possibility seems implied in the Connecticut cases cited in note 5, *supra.* The second would have been for the defendant himself to testify to the inconsistency if he so chose. Under the Connecticut practice, the defendant is normally present during testimony before the grand jury. This allows the accused the opportunity to question the witnesses before the grand jury in an attempt to demonstrate the weaknesses in the State's case. *State* v. *Menillo,* 159 Conn. 264, 268 A.2d 667 (1970); *State* v. *Hamlin,* 47 Conn. 95 (1879). The accused is not sworn to secrecy. Conn. Gen. Stat. Ann. § 1-25.

discretion concerning the proper scope of cross-examination.

This court is not required to find that the trial would have had a different result had the petitioner been allowed to carry out his line of impeachment. As Chief Justice Burger stated in *Davis* v. *Alaska*, 415 U.S. 308, 317 (1974):

> "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas* v. *Alabama*, 380 U.S. [415], at 419 [1965]."

See also, United States ex rel. Washington v. *Vincent*, No. 75-2100 (2d Cir. Nov. 5, 1975) at 384-85.

The interest which Connecticut asserts in the secrecy of grand jury proceedings cannot outweigh the importance of the petitioner's right to cross-examine adverse witnesses. In *Chambers* v. *Mississippi*, 410 U.S. at 295, the Supreme Court stated:

> "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth determining process.' *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970); *Bruton* v. *United States*, 391 U.S. 123, 135-37 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965). Of course, the right to confront and to cross-examine is not abso-

> lute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g., Mancusi* v. *Stubbs,* 408 U.S. 204 (1972). But its denial or significant diminution calls into question the ultimate ' ''integrity of the fact-finding process'' ' and requires that the competing interest be closely examined. *Berger* v. *California,* 393 U.S. 314, 315 (1969).''

In *Davis* v. *Alaska,*[10] the right to cross-examine was held to outweigh the State's interest in maintaining the secrecy of juvenile court proceedings, an interest which had been more consistently asserted than the interest in question here, which apparently has been interpreted in the present case to prohibit a practice which had previously been approved.[11]

In the analogous situation the Supreme Court has held, as a matter of supervision over the lower federal courts, without reaching the constitutional issue, that in federal criminal proceedings the interest in secrecy of grand jury proceedings must yield to the interest in searching cross-examination in circumstances similar to those presented here. *Dennis* v. *United States,* 384 U.S. 855 (1966). *See also* McCormick, *Evidence* § 113 (2d ed. 1973).

It is the conclusion of this court that the petitioner, in his trial, was denied the right to an adequate cross-examination, guaranteed to him by the sixth and fourteenth amendments, and that as a result his conviction cannot

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[10] Although *Davis* was decided after the Connecticut Supreme Court rejected the petitioner's appeal, the decision did not establish a new rule of constitutional law, but rather applied a settled rule of law to a new set of facts. *Cf. Williams* v. *United States,* 401 U.S. 646, and *Mackey* v. *United States,* 401 U.S. 667, 675 (1971) (Harlan, J., dissenting).

[11] *See* note 5, *supra.*

stand. Petitioner is therefore presently in custody in violation of the Constitution of the United States. 28 U.S.C. § 2254.

It is ORDERED that a writ of habeas corpus should issue out of this court discharging the petitioner, Archie Chesney, from custody unless within twenty (20) days the State of Connecticut vacates the judgment of conviction and schedules an early retrial.

Dated at Hartford, Connecticut, this 13th day of November, 1975.

M. JOSEPH BLUMENFELD
United States District Judge

Judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION No. H-75-181

ARCHIE CHESNEY,

VS.

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers.

JUDGMENT

The above-entitled action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge;

And the Court, after a hearing on the Petitioner's Petition for a Writ of Habeas Corpus, having filed its Memorandum of Decision on November 13, 1975, finding that the Petitioner, in his trial, was denied a right guaranteed him by the Sixth and Fourteenth Amendments of the Constitution of the United States, and ordering a Writ of Habeas Corpus to issue out of this Court within twenty (20) days unless the State of Connecticut vacates the judgment of conviction of the Petitioner and schedules an early retrial;

It is accordingly ORDERED and ADJUDGED that the Petitioner's Petition for a Writ of Habeas Corpus issue out of this Court within twenty (20) days of the filing of said Memorandum of Decision unless the State of Connecticut vacates the judgment of conviction of the Petitioner and schedules an early retrial.

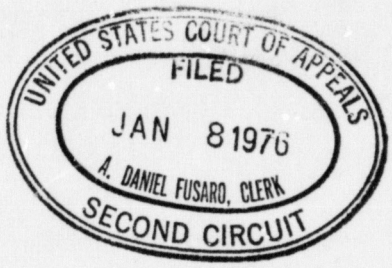
Dated at Hartford, Connecticut, this 21st day of November, 1975.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: (Illegible)
Deputy-in-Charge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



ARCHIE CHESNEY -vs- CARL ROBINSON	75-2147

AFFIDAVIT OF SERVICE

State of Connecticut)
) ss.: New Haven, Connecticut, January 7, 1976
County of New Haven)

Judith Mears, being duly sworn, hereby deposes and says:

1. I am co-counsel in the above-captioned case.

2. I personally prepared the petitioner-appellee's brief on appeal which brief was filed on January 5, 1976.

3. On January 2, 1976, I supervised the first class mailing of 25 copies of this brief to the Court of Appeals and 2 copies of this brief to opposing counsel, Assistant State's Attorney, Richard Jacobson, at his business address (County Courthouse, 1061 Main Street, Bridgeport, Connecticut, 06604).

Judith Mears

Judith Mears

Sworn and subscribed to before me
this 7th day of January, 1976.

Mary F. Keller

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARCHIE CHESNEY,

Petitioner-Appellee,

against

CARL ROBINSON, Warden, Connecticut Correctional Institution, Somers,

Respondent-Appellant.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 22nd day of December, 1975, he served two copies of the Appellant's Brief and Appendix on Steven Wizner, Esq.

the attorney for the Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 127 Wall Street, New Haven, Conn. (xxNxxY., that being the address designated by him for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
22nd day of December, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976